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No. 92-831

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BETHLEHEM STEEL CORPORATION, *et al.*,

Petitioners,

v.

ROYSWORTH B. GRANT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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January 4, 1993

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PETITIONERS' REPLY MEMORANDUM

Petitioners Bethlehem Steel Corporation, James Deaver, Thomas R. Connelly and E. Richard Driggers (collectively referred to herein as "Bethlehem")[1] submit this Reply Memorandum pursuant to Rule 15.6 in response to Respondents' Brief in Opposition.

[1] The "List of Parties" provided pursuant to Rule 29.1 in the Petition remains accurate as of the date hereof.

This action was for a limited amount of back pay under Title VII. Respondents' protestations to the contrary notwithstanding, it was never anything more. Respondents' affidavits in support of the settlement they belatedly accepted conclusively establish that injunctive relief was never available, and that the maximum award of back pay the class they represented might have recovered was $60,000. Notwithstanding these undisputed facts, they rejected a $40,000 settlement offer in October 1977 in favor of a trial three months later in January 1978. When that trial resulted in dismissal, they continued to litigate for years rather than settle. Finally, in 1982, a second Rule 68 offer of judgment by Bethlehem prompted a settlement of only $20,000 more than had been rejected five years earlier. In the process, Respondents incurred $600,000 in legal fees, which they now seek to recover from Bethlehem.

The Second Circuit held that these facts are irrelevant because the amount of recovery in a Title VII action simply is not relevant to the amount of attorneys' fees which may be awarded. (A11-A12) In doing so, it reaffirmed its prior holdings in *Cowan v. Prudential Ins. Co. of America*, 935 F.2d 522 (2d Cir. 1991) and *DiFilippo v. Morizio*, 759 F.2d 231 (2d Cir. 1985).

The Second Circuit's rule that the amount of recovery is irrelevant to the reasonableness of attorneys' fees flies in the face of the statute, and ignores this Court's repeated holdings, most recently in *Farrar v. Hobby*, 113 S. Ct. 566 (1992), that the touchstone of "reasonableness" under Section 1988 is the result obtained. *Farrar* continued and clarified an uninterrupted line of cases to the same effect. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424 (1983); *City of Riverside v. Rivera*, 477 U.S. 561 (1986); *Hewitt v. Helms*, 482 U.S. 753 (1987); *Rhodes v. Stewart*, 488 U.S. 1 (1988); *Texas State Teachers Assoc. v. Garland Independent School Dist.*, 489 U.S. 782 (1989).

Respondents seek to dismiss *Farrar* as establishing a narrow rule in cases involving "nominal" damages, a reading which cannot be supported by this Court's opinion. In apparent

recognition that such a facile distinction is unavailing, Respondents address the remainder of their opposition to justifying their conduct in overlitigating a modest back pay case, *i.e.*, by attempting to establish that, by convincing the Second Circuit to remand the case to the district court for a second trial, they accomplished a public purpose so important that virtually any fee awarded would be reasonable.

However, Respondents' opposition simply ignores the fact that the Second Circuit's rule of law precludes consideration of any of the facts which they now argue. Neither of the courts below considered any of these facts because they were bound by the Second Circuit's rule that the results obtained simply are irrelevant in determining a reasonable attorney's fee under Section 1988. Under the Second Circuit's rule, any attorney who "prevails" must be awarded a fee for the hours he expended regardless of the nature of the case. Indeed, Respondents' efforts to justify their fee by reference to their conduct highlights the absurdity of the Second Circuit's rule.

The rule established in the Second Circuit will reward those who clog the courts with trivial cases and who overlitigate cases in which little is at stake. Indeed, contrary to Congress' intent that attorneys' fees under Section 1988 be reasonable, the rule of law in the Second Circuit provides counsel with a positive economic incentive to overlitigate civil rights cases and to pursue cases of questionable value even in the face of *bona fide* settlement efforts by defendants.

This case provides an appropriate opportunity to clarify that there is a rule of proportionality in the awarding of attorneys' fees under Section 1988 and to reverse the incorrect and inflexible rule in the Second Circuit. Accordingly, Petitioners respectfully request that this Court issue a writ of certiorari

to review the judgment of the United States Court of Appeals for the Second Circuit.

January 4, 1993

Respectfully submitted,

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